No. 14,252

IN THE

United States Court of Appeals

For the Ninth Circuit

LENG MAY MA,

Appellant,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service, San Francisco District,

Appellee.

REPLY BRIEF.

LLOYD H. BURKE,
United States Attorney,
CHARLES ELMER COLLETT,
Assistant United States Attorney,
422 Post Office Building,
7th and Mission Streets,
San Francisco 1, California,
Attorneys for Appellee.

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STATEMENT OF THE CASE.

The petition for writ of habeas corpus was filed by appellant on January 26, 1954. An ex parte application made the same day to the District Court for the issuance of the writ or an order to show cause was denied. On January 28, 1954 an order denying the petition for writ of habeas corpus was filed. (Tr. 8.) The appeal was noted from the order.

The status of the appellant herein is identical with the status of the appellant *Jew Sing* in the case of *Jew Sing v. Barber,* 215 F. 2d 906. Leng May Ma

sought admission to the United States at the Port of San Francisco. She was *excluded.* (Tr. 4.) She was notified to surrender herself to the officer in charge of the Immigration and Naturalization Service to be returned to the country from which she came.

In accordance with the notice she did surrender and an application was filed for a stay of deportation under the provisions of Section 243(h) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1253(h)) and pursuant to the provisions of 8 C.F.R. 243(3)(b).

The application was denied on the ground that having been *excluded* she was not within the United States and was therefore not eligible for the relief afforded by Section 243(h).

STATUTE INVOLVED.

Section 243(h), Immigration and Nationality Act of 1952 (8 U.S.C.A. 1253(h)):

> "The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."

QUESTION PRESENTED.

Is a person who has been *excluded* from the United States eligible for discretionary consideration by the Attorney General under 8 U.S.C. 1253(h)?

ARGUMENT.

The brief filed by appellant herein is almost entirely copied from the brief filed by the appellant in the *Jew Sing* case, (No. 14,146, in this Court). The bottom paragraph on page 14 of the brief herein has been added.

The added paragraph (p. 14) states:

> "It is well realized that this Court in *Jew Sing v. Barber,* 215 F.2d 906, sustained the position of the District Director of the Immigration and Naturalization Service. However, it should be noted that certiorari was granted in the case of *Jew Sing v. Barber,* 348 U.S. 910, and that the decision of the Court of Appeals for the Ninth Circuit was reversed with instructions that the case be remanded to the District Court for dismissal on the suggestion of mootness, 350 U.S. 898. We would also like to call attention of the Court to the decision of the Court of Appeals for the District of Columbia in *Lim Fong v. Brownell,* 215 F.2d 683, in which case that Court reached an opposite conclusion. Also compare *U.S. v. Shaughnessy,* 234 F.2d 715."

In *Jew Sing v. Barber,* 215 F.2d 906 this Court said (p. 907):

> "The question is whether an alien seeking admission to the United States is 'within the United

States' while his application for such admission is under consideration and after it has been decided against him. We think not. His status as a person released by the immigration authorities on bond is still that of a person without the United States seeking admission."

Kaplan v. Tod, 267 U.S. 228;

U. S. v. Spar, 149 F. 2d 881 (Cir. 2);

U. S. v. Corsi, 65 F. 2d 322 (Cir. 2).

Appellant has "well realized" that the *Jew Sing* decision is directly in point and is against him. No attempt is made in the brief to persuade this Court that said decision is erroneous. Certiorari *was* granted by the Supreme Court, but before the matter was briefed or heard by the Supreme Court, a renewed application for naturalization made by *Jew Sing* was granted and he became an American citizen. The case was therefore moot and upon motion made following *United States v. Munsingwear,* 340 U.S. 36, 39-40, the Supreme Court reversed the judgment and remanded with direction to dismiss as moot.

Appellant has cited the District of Columbia case of *Lim Fong v. Brownell,* 215 F.2d 683, as reaching "an opposite conclusion".

The *Lim Fong* case was cited to this Court in a supplemental brief filed by appellant in *Jew Sing.* Appellant there, and again here, fails to point out to the Court that Lim Fong was ordered deported in an *expulsion* proceeding, not exclusion. *Lim Fong* was within the United States. The case of *United States*

ex rel. Fong Foo v. Shaughnessy, 234 F. 2d 715 is also a deportation *expulsion* proceeding, not exclusion.

Appellant has cited no authority in support of the proposition that a person excluded from admission to the United States is *within* the United States. The Supreme Court has repeatedly said No.

Nishimura Ekiu v. U. S., 142 U.S. 651;
United States v. Ju Toy, 198 U.S. 253;
Kaplan v. Tod, 267 U.S. 228;
Shaughnessy v. Mezei, 345 U.S. 206;
Dong Wing Ott v. Shaughnessy, 142 F. Supp. 379, D.C., S.D., N.Y., July 17, 1956.

CONCLUSION.

It is submitted that appellant is not an "alien within the United States" within the meaning of Section 243(h) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1253(h), and is therefore not entitled to make application for a stay of deportation under the provisions of said section. The order of the Court below should be affirmed.

Dated, San Francisco, California,
December 17, 1956.

Respectfully submitted,
LLOYD H. BURKE,
United States Attorney,
CHARLES ELMER COLLETT,
Assistant United States Attorney,
Attorneys for Appellee.